

2019 ADVANCED DUI TRIAL ADVOCACY

September 9 - 12, 2019
Phoenix, Arizona



OVERLOOKED DUI JURY INSTRUCTIONS Marijuana Jury Instructions with Affirmative Defense

Presented by:

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Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
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STATE'S REQUESTED INSTRUCTION

A.R.S. § 28-1381(A)(1) Medical Marijuana Card is Not a Defense

It is not a defense to a charge of A.R.S. § 28-1381(A)(1) that a person is or has been entitled to use a drug under the laws of this state. You may not consider whether the defendant had a valid medical marijuana card in determining whether the defendant was impaired to the slightest degree by the drugs in his/her system.

Source A.R.S. § 28-1381(B)

STATE'S REQUESTED LIMITING INSTRUCTION

You may not consider whether the defendant had a valid medical marijuana card in determining whether the defendant was impaired to the slightest degree by the drugs in his/her system under the A.R.S. § 28-1381(A)(1) charge.

Source A.R.S. § 28-1381(B)

28.1381(A)(3) – Driving or Actual Physical Control While There Is a Drug in the Defendant's Body (RAJI)

The crime of driving or actual physical control while there is a drug in the defendant's body requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [driving] [being in actual physical control of] the vehicle.

28-1381(A)(3) - DRIVING WITH AN ILLEGAL DRUG (variation)

The crime of driving or actual physical control while there is a drug in the defendant's body requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. That at the time of driving (actual physical control), a drug defined in section 13-3401, or its metabolite, was in the defendant's body.

Include in jury instruction that the drug/s are defined in A.R.S. § 13-3401

For example

Cannabis is a drug defined in A.R.S. § 28-13-3401. OR

Hydroxy THC is a metabolite of Cannabis which is a drug defined in A.R.S. § 13-3401.

Instructions for the Affirmative Defense.

STATE'S REQUESTED INSTRUCTIONS

A.R.S. § 28-1381(A)(3) Medical Marijuana Affirmative Defense Instruction

It is a defense to the A.R.S. § 28-1381(A)(3) charge that the marijuana or marijuana metabolite in the defendant's system was authorized by the Arizona Medical Marijuana Act (AMMA) and in a concentration insufficient to cause impairment. If you find that the defendant had marijuana or its active metabolite [or a drug or drugs defined in section 13-3401 or their metabolites] in his/her body while driving or being in actual physical control you must then decide:

- 1) whether the defendant's use of marijuana was authorized by the AMMA and;
- 2) whether the defendant has proven that the concentration was insufficient to cause impairment.

There is a presumption that the defendant's use was authorized by the AMMA if the defendant was in possession of a registry identification card and no more than 2.5 ounces of marijuana on the date of violation. [This presumption disappears if rebutted with evidence the use of marijuana was not for the purpose of treating or alleviating the debilitating medical condition or symptoms associated with the condition.]

It is the defendant's burden to prove this defense by a preponderance of the evidence. You must find the defendant not guilty of the A.R.S. § 28-1381(A)(3) charge if you find by a preponderance of the evidence that the concentration of marijuana or its metabolite was in an insufficient concentration to cause impairment.

Source: *Dobson v. McClennen (City of Mesa, RPI)*, 238 Ariz. 389 (2015); A.R.S. §§ 36-2811(A)(1); 36-2802(D).

Instructions for the Affirmative Defense.

STATE'S REQUESTED INSTRUCTIONS

A.R.S. § 28-1381(A)(3) Medical Marijuana Affirmative Defense Instruction

It is a defense to the A.R.S. § 28-1381(A)(3) charge that the marijuana or its metabolite in the defendant's system was in a concentration insufficient to cause impairment. If you find that the defendant had a drug or drugs defined in section 13-3401 or their metabolites in his/her body while driving or being in actual physical control you must then decide whether the defendant has proven that that the concentration was insufficient to cause impairment.

It is the defendant's burden to prove this defense by a preponderance of the evidence. You must find the defendant not guilty of the A.R.S. § 28-1381(A)(3) charge if you find by a preponderance of the evidence that the concentration of marijuana or its metabolite was in an insufficient concentration to cause impairment.

Source: *Dobson v. McClennen (City of Mesa, RPI)*, 238 Ariz. 389 (2015); A.R.S. § 36-2802(D)

NOTE: only given if the person has proven his/her use was authorized by the AMMA (in possession of a registry identification card and 2.5 ounces or less) A.R.S. § 36-2811(A)(1); *Dobson*. This establishes a presumption. The presumption disappears if rebutted with evidence conduct was not for purpose of treating or alleviating the debilitating medical condition or symptoms associated with the condition. [§ 36-2811(2)]. If rebutted defense should not be allowed.

A.R.S. § 28-1381(A)(3) Medical Marijuana Affirmative Defense Instruction - derived from criminal RAJIS 2.025

The defendant has raised the affirmative defense of being an authorized medical marijuana user with a concentration of THC or its metabolite insufficient to cause impairment with respect to the charged offense of driving or being in actual physical control of a vehicle while there is a drug defined in 13-3401 or its metabolite in his system. The burden of proving each element of the offenses beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of being an authorized medical marijuana user with a concentration of THC or its metabolite insufficient to cause impairment is on the defendant. The defendant must prove that he/she was an authorized medical marijuana user with a concentration of THC or its metabolite in insufficient concentration to cause impairment by a preponderance of the evidence. If you find that the defendant has proven the affirmative defense of being an authorized medical marijuana user with a concentration of THC or its metabolite insufficient to cause impairment by a preponderance of the evidence you must find the defendant not guilty of the offense of driving or being in actual physical control of a vehicle while there is a drug defined in 13-3401 or its metabolite in his system.

A.R.S. § 36-2801(17) Visiting Qualifying Patient Instruction (for out-of-state cards)

An out-of-state medical marijuana card may qualify a person as an authorized user of marijuana under the Arizona Medical Marijuana act if he/she is a Visiting Qualifying Patient. A Visiting Qualifying Patient is a person who:

- 1) is not an Arizona resident or had been an Arizona resident for less than thirty days on the date of violation and;
- 2) was diagnosed with a debilitating medical condition by a person licensed in the person's state of residence or, in the case of a person who has been a resident of Arizona less than thirty days, the state of the person's former residence.

"Debilitating medical condition" means one or more of the following:

- a) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, crohn's disease, agitation of alzheimer's disease or the treatment of these conditions.
- b) A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including those characteristic of epilepsy; or severe and persistent muscle spasms, including those characteristic of multiple sclerosis.

It is the defendant's burden to prove, by a preponderance of the evidence, that he/she is a Visiting Qualifying Patient.

Source: A.R.S. §§ 36-2801(17) & (3)

Preponderance of the evidence Standard Criminal 5b(2) – Standards for the Burden of Proof

Preponderance of the Evidence – A party having the burden of proof by a preponderance of the evidence must persuade you, by the evidence, that the claim or a fact is more probably true than not true. This means the evidence that favors that party outweighs the opposing evidence.

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OVERLOOKED DUI JURY INSTRUCTIONS Prescription DUI Jury Instructions

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STATE'S REQUESTED INSTRUCTION

A.R.S. § 28-1381(A)(1) Prescription is Not a Defense

It is not a defense to a charge of A.R.S. § 28-1381(A)(1) that a person is or has been entitled to use a drug under the laws of this state. You may not consider whether the defendant had a valid prescription or was taking drugs as prescribed in determining whether the defendant was impaired to the slightest degree by the drugs in his/her system.

Source A.R.S. § 28-1381(B)

STATE'S REQUESTED LIMITING INSTRUCTION

You may not consider whether the defendant had a valid prescription for the drugs/metabolites alleged to have been found in his/her blood or was taking them as prescribed when deciding whether the defendant was impaired to the slightest degree under the A.R.S. § 28-1381(A)(1) charge.

28.1381(A)(3) – Driving or Actual Physical Control While There Is a Drug in the Defendant's Body (RAJI)

The crime of driving or actual physical control while there is a drug in the defendant's body requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [driving] [being in actual physical control of] the vehicle.

28-1381(A)(3) - DRIVING WITH AN ILLEGAL DRUG (variation)

The crime of driving or actual physical control while there is a drug in the defendant's body requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. That at the time of driving (actual physical control), a drug defined in section 13-3401, or its metabolite, was in the Defendant's body.

Include in jury instruction that the drug/s are listed in A.R.S. § 13-3401

For example

Alprazolam is a drug defined in A.R.S. § 13-3401.

Instructions for the Affirmative Defense.

STATE'S REQUESTED INSTRUCTIONS

A.R.S. § 28-1381(A)(3) & A.R.S. § 28-1381(D) Affirmative Defense Instruction

It is a defense to the A.R.S. § 28-1381(A)(3) charge that the defendant was taking the drugs in his or her system "as prescribed." If you find that the defendant had a drug or drugs defined in section 13-3401 or their metabolites in his/her body while driving or being in actual physical control then you must decide whether the defendant has proven that he/she was using each of those drugs "as prescribed" by a licensed medical practitioner.

It is the defendant's burden to prove this defense by a preponderance of the evidence. You must find the defendant not guilty of the A.R.S. § 28-1381(A)(3) charge if you find by a preponderance of the evidence that the defendant was using each of the drugs you have found to be in his s/her system pursuant to a valid prescription issued by a licensed physician and that each was used "as prescribed."

Source: *State v. Bayardi (Fannin, RPI)*, 230 Ariz. 195, 281 P.3d 1063 (App. 2013); A.R.S. § 28-1381(D)

A.R.S. § 28-1381(A)(3) A.R.S. § 28-1381(D) Affirmative Defense Instruction (variation)

It is a defense to the A.R.S. § 28-1381(A)(3) charge that the defendant was taking the drugs in his or her system "as prescribed." If you find that the defendant had a drug or drugs defined in section 13-3401 or their metabolites in his/her body while driving or being in actual physical control then you must decide whether the defendant was using those drugs "as prescribed." It is the defendant's burden to prove this defense by a preponderance of the evidence. You must find the defendant not guilty of the A.R.S. § 28-1381(A)(3) charge if you find by a preponderance of the evidence that the defendant was using any and all drugs defined in section 13-3401 that were in his/her system while driving "as prescribed."

Source: *State v. Bayardi (Fannin, RPI)*, 230 Ariz. 195, 281 P.3d 1063 (App. 2013); A.R.S. § 28-1381(D)

Affirmative Defense derived from criminal RAJIS

The defendant has raised the affirmative defense of [using a drug as prescribed by a medical practitioner] with respect to the charged offense of driving or being in actual physical control of a vehicle while there is a drug defined in 13-3401 or it's metabolite in his system. The burden of proving each element of the offenses beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of using a drug as prescribed is on the defendant. The defendant must prove the affirmative defense of using a drug as prescribed by a preponderance of the evidence. If you find that the defendant has proven the affirmative defense of using a drug as prescribed by a preponderance of the evidence you must find the defendant not guilty of the offense of driving or being in actual physical control of a vehicle while there is a drug defined in 13-3401 or it's metabolite in his system.

Preponderance of the evidence Standard Criminal 5b(2) – Standards for the Burden of Proof

Preponderance of the Evidence – A party having the burden of proof by a preponderance of the evidence must persuade you, by the evidence, that the claim or a fact is more probably true than not true. This means the evidence that favors that party outweighs the opposing evidence.